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NO. 84-199 (2)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

RANGELEY A. BROWN and POLLY P. BROWN
and McDONALD's CORPORATION,
a Corporation

Petitioners,

v.

GENERAL ELECTRIC COMPANY, a Corporation,
and HOBART CORPORATION, a Corporation,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

Whether the petition for writ of certiorari should be denied when the opinions of the Fourth Circuit Court of Appeals and the District Court were correct and fully in accord with precedent of the North Carolina courts and courts of other jurisdictions, and when the statute in question does not violate provisions of either the United States Constitution or the North Carolina Constitution?

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IN THE
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RANGELEY A. BROWN and POLLY P. BROWN
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GENERAL ELECTRIC COMPANY, a
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BRIEF IN OPPOSITION TO PETITION FOR
WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE
FOURTH CIRCUIT

STATEMENT OF THE CASE

This is a products liability action, originally brought in federal court on the basis of diversity jurisdiction, in which the

petitioners seek recovery for property damage and loss of income. The petitioners allege that they suffered damages as the result of a fire which occurred on December 12, 1980 at a McDonald's restaurant and which originated in a fryer manufactured by General Electric Company.

The Complaint alleged that the fryer was initially purchased on or about December 13, 1974. The petitioners filed suit in the present action on December 11, 1981, almost seven years after the initial purchase of the fryer. Therefore, in response to the Complaint, the respondents pled the defense of the statute of limitations provided by the six year statute of repose

contained in N.C.G.S. §1-50(6).

The respondents moved for summary judgment on the basis that the petitioners' claim was effectively barred by the statute of repose. The District Court granted the motion and dismissed the case on July 12, 1983. The petitioners appealed to the United States Court of Appeals for the Fourth Circuit on July 25, 1983 on the grounds that N.C.G.S. §1-50(6) was unconstitutional. The Court of Appeals, in a per curiam opinion filed on May 8, 1984, affirmed the judgment of the District Court and upheld the constitutionality of N.C.G.S. §1-50(6).

This action is governed by N.C.G.S. §1-50(6), therefore, the

only facts relevant to the petitioners' appeal are the date of the initial purchase of the allegedly defective fryer and the date on which the petitioners brought suit. The petitioners allege that the fryer in question was purchased for use by petitioner McDonalds "on or about" December 13, 1974. The petitioners further allege that on December 12, 1980 the fryer malfunctioned and caused a fire which resulted in both property damage and loss of income. Both of these allegations were specifically denied by the respondents.[1] Suit was filed on

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1 The respondents have evidence, which is controverted by the petitioners, that the date of purchase of the fryer in question was several days earlier than December 13, 1974. If the date of purchase was earlier than December 13, 1974,

December 11, 1981, nearly a year after the fire allegedly occurred. Application of N.C.G.S. §1-50(6) to the facts alleged in the Complaint, therefore, clearly bars the petitioners' action. The applicable six year statute of repose commenced on the date of purchase, which was, at the latest, December 13, 1974, and therefore ran at least by December 13, 1980. The petitioners' suit was not filed until almost a year after the statute had run.

SUMMARY OF ARGUMENT

The North Carolina Supreme Court has upheld the constitution-

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1 continued.
then the six year period of repose would have expired before the fire occurred and therefore before petitioners' purported claim for relief occurred.

ality of N.C.G.S. §1-50(5), a companion provision to N.C.G.S. §1-50(6), and has indicated in strong dicta that it would uphold the constitutionality of N.C.G.S. §1-50(6). Also, other jurisdictions have upheld the constitutionality of similar statutes of repose against the same contentions as those advanced by the petitioners in this case.

Barring a products liability action not brought within six years from the date of purchase of the product is not arbitrary. Application of N.C.G.S. §1-50(6) did not interfere with a vested right of the petitioners because the petitioners had no cause of action when N.C.G.S. §1-50(6) was enacted.

North Carolina General Statute §1-50(6) does not create any classifications which are not reasonably related to a legitimate legislative purpose and does not bar access to the courts.

ARGUMENT

I. THE OPINIONS OF THE COURTS BELOW WERE CORRECT AND FULLY IN ACCORD WITH PRECEDENT OF THE NORTH CAROLINA COURTS AND THE COURTS OF OTHER JURISDICTIONS

Both the District Court and the Court of Appeals below gave full consideration to the questions now presented by the petitioners and accurately decided that the statute of repose provided in N.C.G.S. §1-50(6) was constitutional. See Brown, et al., v. General Electric,

et al., No. 81-84-CIV-3 (E.D.N.C. July 12, 1983)(App. pp.A-1 - A-4); Brown, et al. v. General Electric, et al., No. 83-1685 (4th Cir. May 8, 1984) (App. pp.A-5 - A-9). The Court of Appeals affirmed the District Court's conclusion that N.C.G.S. §1-50(6) is a statute of repose, does not violate either the United States Constitution or the North Carolina Constitution, and is an absolute bar to recovery under the facts alleged in the Complaint. (App. pp.A-9).

The District Court was persuaded of the constitutionality of N.C.G.S. §1-50(6) by virtue of the North Carolina Supreme Court's decision in the case of Lamb v. Wedgewood South Corp., 308 N.C. 419,

302 S.E.2d 886 (1983). In the Lamb decision, the North Carolina Supreme Court upheld the validity of N.C. G.S. §1-50(5), a companion provision to N.C.G S. §1-50(6), which established a six year statute of repose applicable to action brought against architects and builders and arising out of defective conditions of improvements made to real property. Also, strong dicta of the North Carolina Supreme Court in the case of Bolick v. American Barmag Corp., 306 N.C. 364, 293 S.E.2d 415 (1982) confirmed the District Court's opinion that N.C.G.S. §1-50(6) should be found to be constitutional. The Bolick Court distinguished procedural statutes of limitations from substantive

limitations, or conditions precedent annexed to a right of action created by statute, and noted that "the legislature has created just such a condition precedent in G.S.§1-50(6). 306 N.C. at 370, 293 S.E.2d at 420.

Applying the substantive North Carolina law as enunciated by the North Carolina Supreme Court, the District Court correctly granted summary judgment for the respondents because the action was filed more than six years after the purchase of the product, and was therefore clearly barred by the constitutionally valid statute of repose in N.C.G.S. §1-50(6).

The federal district courts in North Carolina have recognized

N.C.G.S. §1-50(6) as establishing an outside time limit for the bringing of claims based on defective products, and the statute has been applied to bar claims brought outside of the six year period of repose. Tims v. Kerr Lake Country Club, Inc., 82-53-CIV-5, Order on Summary Judgment Motion, (E.D.N.C., July 8, 1983); Bobbitt v. Tannewitz, 538 F.Supp. 654 (M.D.N.C. 1982). Similarly, courts in other jurisdictions, including the Seventh Circuit Court of Appeals, have upheld the constitutionality of statutes of repose such as that provided in N.C.G.S. §1-50(6). Pitts v. Unarco Industries, Inc., 712 F.2d 276 (7th Cir. 1983) cert. denied, ___ U.S. ___, 104 S.Ct. 509

(1983); Adair v. Koppers Co., Inc., 541 F.Supp. 1120 (N.D.Ohio 1982); Mullis v. Southern Co. Services, Inc., 250 Ga. 90, 296 S.E.2d 579 (1982); Twin Falls Clinic & Hospital Building Corp. v. Hamill, 103 Idaho 19, 644 P.2d 341 (1982); Hawkins v. D & J Press Co., Inc., 527 F.Supp. 386 (D.C. Tenn. 1981); O'Brien v. Hazelet & Erdal, 410 Mich. 1, 299 N.W.2d 336 (1980); Burmaster v. Gravity Drainage Dist. No. 2, 366 So.2d 1381 (La.App. 1978); Carter v. Hartenstein, 248 Ark. 1172, 455 S.W.2d 918 (1970), appeal dismissed, 401 U.S. 901 (1971).

In the case of Pitts v. Unarco Industries, Inc., 712 F.2d 276 (7th Cir. 1983) cert. denied, ___ U.S. ___, 104 S.Ct. 509 (1983), the Court

of Appeals for the Seventh Circuit upheld the constitutionality of Indiana's ten year statute of repose for products liability actions against the plaintiffs' contentions that the statute violated both equal protection and due process. The Court of Appeals held that application of the statute did not deprive the plaintiff of due process because her cause of action had not accrued when the statute of repose was enacted, therefore, she had no vested right which the change in the law may have affected. The Court of Appeals also found that the statute complied with equal protection because the classifications created by the statute revealed a "legitimate

legislative purpose." 712 F.2d at 280.

The decision of the District Court and the decision of the Court of Appeals for the Fourth Circuit, affirming the lower court's judgment, fully accord with precedent of the North Carolina courts and of courts in other jurisdictions. Therefore, the petitioners' petition for writ of certiorari should be denied.

II. NORTH CAROLINA GENERAL STATUTE §1-50(6) DOES NOT VIOLATE THE DUE PROCESS OR EQUAL PROTECTION PROVISIONS OF EITHER THE UNITED STATES CONSTITUTION OR THE NORTH CAROLINA CONSTITUTION, NOR DOES THE STATUTE VIOLATE

THE "OPEN COURTS" PROVISION OF THE NORTH CAROLINA CONSTITUTION.

A. The Statute Does Not Violate The Due Process Provisions.

The six year statute of repose provided in N.C.G.S. §1-50(6) is a rational means of achieving the purpose which the Legislature sought of protecting manufacturers from increasing insurance premiums and protecting consumers from the resultant increase in product costs. In enacting N.C.G.S. §1-50(6), the North Carolina Legislature was attempting to avert what it could reasonably determine to be a product liability "crisis." Evidence available to the North Carolina Legislature in 1979 demonstrated that

"increasing jury awards and rising insurance premiums have raised widespread questions about the current operation of product liability law." Foreword to Symposium On Product Liability Law, 56 N.C.L. Rev. 623 (1978).

Barring a products liability action not brought within six years from the date of purchase of the product is not arbitrary. The six year time limit provided by N.C.G.S. §1-50(6) could have reasonably been selected by the North Carolina Legislature based on the available evidence that 97% of all product-related injuries occur within six years of the date of purchase. Model Uniform Product Liability Act, analysis, 44 Fed. Reg. 62,714, 62,733-

734 (1979).

The six year outside time limit for product liability claims provided by N.C.G.S. §1-50(6) is identical to the time limit for claims against architects and builders provided by N.C.G.S. §1-50(5), the constitutionality of which has been upheld. See, Lamb v. Wedgewood South Corp., supra. The six year time limit provided by North Carolina's statute is longer than the period of a statute of repose which has been upheld in at least one other jurisdiction. Carter v. Hartenstein, 248 Ark. 1172, 455 S.W.2d 918 (1970), appeal dismissed, 401 U.S. 901 (1971) (Four year statute of repose for architects and builders held to be

constitutional).

Numerous other jurisdictions have also ruled that statutes of repose, similar to N.C.G.S. §1-50(6), comply with due process. Scalf v. Berkel, Inc., 448 N.E.2d 1201 (Ind. 1983); Hawkins v D & J Press Co., Inc., 527 F.Supp. 386 (D.C. Tenn. 1981); O'Brien v. Hazelet & Erdal, 410 Mich. 1, 299 N.W.2d 336 (1980); Burmaster v. Gravity Drainage Dist. No. 2, 366 So.2d 1381 (La.App. 1978).

The petitioners had no cause of action at the time N.C.G.S. §1-50(6) was enacted, therefore application of the statute interferes with no vested right. The petitioners' argument to the contrary relies on cases in which the courts were con-

cerned with the application of a newly enacted, procedural statute of limitations which, when enacted, affected the plaintiffs' right to bring suit. See Wilson v. Iseminger, 185 U.S. 54 (1902); Flippin v. Jarrell, 301 N.C. 109, 270 S.E.2d 482 (1980); Blevins v. Northwest Carolina Utilities, Inc., 209 N.C. 683, 184 S.E. 517 (1936).

The statute of repose provided in N.C.G.S. §1-50(6) was enacted by the General Assembly of North Carolina in 1979 to become effective October 1, 1979. Products Liability Act, Ch. 654 §§2, 7, 8, 1979 N.C. Sess. Laws 687, 689, 690. In the present case, the petitioners contend that their cause of action arose in 1980. They filed suit in

1981. North Carolina General Statute §1-50(6) was in effect when their cause of action allegedly arose and had been in effect for over two years by the time the suit was filed. These facts do not present a question of the sufficiency of the "grace period" provided before newly enacted legislation is to take effect.

B. The Statute Does Not Violate The Equal Protection Provisions.

Any classifications which N.C.G.S. §1-50(6) may make between manufacturers of products with long lives and manufacturers of products with short lives or between plaintiffs injured immediately prior to and those injured immediately subsequent to the termination of the six

year period of repose are rationally related to the legitimate legislative purpose. See Hughes v. Alexandria Scrap Corp., 426 U.S. 794 (1976). The classifications of which the petitioners complain were created by the North Carolina Legislature to prevent open-ended liability for manufacturers and to assure the availability of reasonably priced product liability insurance, thus, the distinctions made are reasonably related to the ends the Legislature sought to attain. See Model Uniform Product Liability Act, analysis, 44 Fed. Reg. 62,714, 62, 733 (1979).

Courts in numerous other jurisdictions have held that statutes of repose similar to N.C.G.S. §1-50(6)

do not violate either state or federal equal protection guarantees. Pitts v. Unarco Industries, 712 F.2d 276 (7th Cir. 1983) cert. denied, ___ U.S. ___, 104 S.Ct. 509 (1983); Adair v. Koppers Co., Inc., 541 F.Supp. 1120 (N.D. Ohio 1982); Barnhouse v. City of Pinole, 133 Cal. App.3d 171, 183 Cal.Rptr. 881 (1982); Mullis v. Southern Co. Services, Inc., 250 Ga. 90, 296 S.E.2d 579 (1982); Terry v. New Mexico State Highway Comm., 98 N.M. 119, 645 P.2d 1375 (1982).

C. The Statute Does Not Violate The "Open Courts" Provision Of The North Carolina Constitution.

By setting an outside time limit for the commencement of a products liability action of six

years from the date of initial purchase, the North Carolina Legislature did not bar access to the courts. Confronted with the contention that the statute of repose provided in N.C.G.S. §1-50(5) violated the "open courts" provision of the North Carolina Constitution, the North Carolina Supreme Court upheld the validity of the statute finding that all claims under the statute were not absolutely barred. Lamb v. Wedgewood South Corp., supra. Rather, "[t]he statute's effect is that unless the injury occurs within the six-year period, there is no cognizable claim." 308 N.C. at 444.

Other jurisdictions with state constitution provisions similar to

Art. I, Section 18 of the North Carolina Constitution have upheld statutes of repose similar to that in N.C.G.S. §1-50(6) against the challenge that such a statute of repose violated the state constitution's "open courts" provision. Carney v. Moody, 646 S.W.2d 40 (Ky. 1983); Klein v. Catalano, 386 Mass. 701, 437 N.E.2d 514 (1982); Anderson v. Fred Wagoner and Roy Anderson, Inc., 402 So.2d 320 (Miss. 1981); Freezer Storage, Inc. v. Armstrong Cork Co., 476 Pa. 270, 382 A.2d 715 (1978).

CONCLUSION

For the foregoing reasons, and such other reasons as may be persuasive to the Court, the respondents submit that the petition for

writ of certiorari should be denied.

Respectfully submitted, this the 31 day of August, 1984.

SMITH, ANDERSON, BLOUNT, DORSETT, MITCHELL & JERNIGAN

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APPENDIX

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
FAYETTEVILLE DIVISION

No. 81-84-CIV-3

RANGELEY A. BROWN, et al.,	)	
Plaintiffs,	)	
v.	)	ORDER
GENERAL ELECTRIC COMPANY, a corporation, et al.,	)	
Defendants.	)	

Plaintiffs instituted this action on 11 December 1981 alleging damages to property and loss of income as a result of a fire which occurred on 12 December 1980 and which plaintiffs allege was caused by a defective fryer sold by defendant on 13 December 1974. Defendants have moved for summary

judgment relying on N.C. Gen. Stat. 1-50(6) which provides that

> No action for the recovery of damages for personal injury, death or damage to property based upon or arising out of any alleged defect or any failure in relation to a product shall be brought more than six years after the date of initial purchase for use or consumption.

Although the North Carolina Supreme Court has yet to address the validity of this section, it has addressed the validity of N.C. Gen. Stat. 1-50(5)a, a companion provision dealing with defective or unsafe conditions resulting from an

improvement to real property, and has found that statute valid. Lamb v. Wedgewood South Corp., No. 156A82 (May 31, 1983). In addition, Bolick v. American Barmag Corp., 306 N.C. 364, 293 S.E.2d 415 (1982), by way of dicta, strongly indicated a similar result for N.C. Gen. Stat. 1-50(6).

Viewing the statute relied upon by defendants to be a statute of repose and an absolute bar to recovery under the facts as stated in the complaint filed herein, the motion of defendants for summary judgment is allowed. See Tims v. Kerr Lake Country Club, Inc., No. 83-53-CIV-5 (E.D.N.C. 8 July 1983).

This action is hereby dismissed.

AND IT IS SO ORDERED.

This 11th day of July, 1983.

/S/ W. Earl Britt
W. EARL BRITT
United States District
Judge

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 83-1685

Rangeley A. Brown, Polly P. Brown and McDonald's Corporation, a corporation,

Appellants,

versus

General Electric Company, a corporation and Hobart Corporation, a corporation,

Appellees.

Appeal from the United States District Court for the Eastern District of North Carolina, at Fayetteville. W. Earl Britt, District Judge. (81-84-CIV-3)

Argued February 9, 1984. Decided May 8, 1984.

Before RUSSELL, WIDENER and PHILLIPS, Circuit Judges.

Henry L. Anderson, Jr. (Anderson, Broadfoot, Anderson, Johnson & Anderson on brief) for Appellants; James G. Billings (Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan on brief) for Appellees.

PER CURIAM:

The plaintiffs in this product liability action appeal from the district court's order granting summary judgment to the defendants. We affirm.

This suit arose as a result of fire at a McDonald's Restaurant that was operated by Rangeley and Polly Brown, who, along with McDonald's Corporation, are appellants here. The fire originated in a fryer manufactured by General Electric Co., a defendant below, allegedly as the result of the fryer's defective design and construction. The

complaint alleges that General Electric originally sold the fryer to McDonald's Corp. on December 13, 1974, and that the Browns acquired it in May of 1979. It is undisputed that the fire occurred on December 12, 1980, and that the plaintiffs filed suit December 11, 1981, almost seven years after the fryer's original sale.

On these alleged facts, the district court granted summary judgment, relying upon the limitations bar of N.C.G.S. Section 1-50(6) which provides:

> "No action for the recovery of damages for personal injury, death or damage to property based upon or arising out of any alleged defect or any failure in relation to a product shall be brought more than six years after

> the date of initial purchase for use or consumption."

Appellants do not contest the district court's holding that the statute's literal terms bar their claim, but challenge the operation of the statute on constitutional grounds. First, they contend that, as applied to them, the statute violates the due process clause of the fourteenth amendment to the United States Constitution and article I, section 18 of the North Carolina Constitution, in that it unconstitutionally destroys a vested right by barring actions accruing so near to the expiration of the six-year statutory period that filing suit within that period would be effectively impossible. Second,

they argue that, on its face, the statute is a violation of the equal protection guarantees of the United States and North Carolina Constitutions in that it makes a number of arbitrary and irrational classifications. Finally, they challenge the statute as a violation of the "open courts" provision of the North Carolina Constitution.

Having considered the briefs and oral arguments, we are persuaded that the district court correctly rejected the appellants' constitutional challenges. We therefore affirm on the reasoning of the district court. Brown v. General Electric Co., No. 81-84-CIV-3 (E.D.N.C. July 12, 1983).

AFFIRMED.

CERTIFICATE OF SERVICE

I, James G. Billings, do hereby certify that in accordance with Rule 28 of the Rules of the Supreme Court I have on this date served three copies of this Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit, by causing the same to be deposited in the United States mail, first-class postage prepaid, addressed to the attorney for the petitioners as follows:

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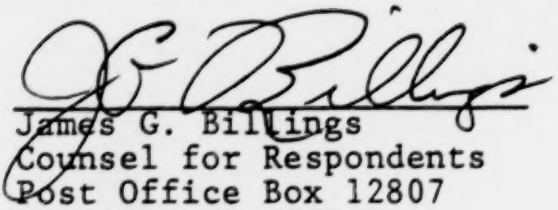
This the 31st day of August, 1984.



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